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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID DAWSON,

Defendant and Appellant.

E072052

(Super.Ct.No. FSB06601)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

This is defendant and appellant David Dawson's third appeal following his attempts to recall and reduce his sentence pursuant to Penal Code¹ sections 1170.18 (Proposition 47) and 1170.126 (Proposition 36). Defendant again appeals from an order denying his petition for recall and resentencing of his indeterminate sentence of 35 years to life for his current commitment offenses of attempted robbery (§§ 664 & 211; count 1) and felon in possession of a firearm (former § 12021, subd. (a); count 4) under section 1170.126, subdivision (f). Based on our independent review of the record, we find no error and affirm the order.

II

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are brief.² Two police officers responded to a report of an attempted robbery at a drugstore. When the first officer (Schultenrich) arrived at the store, he saw three men walk out the front door. A drugstore employee pointed the three men out to Schultenrich as the men quickly walked away. As the men were walking away, a second officer (Rodriguez) walked up to the store and saw that one of the men

¹ All future statutory references are to the Penal Code unless otherwise stated.

² We take the facts of defendant's underlying conviction from the record in defendant's prior appeal (*People v. Dawson* (July 13, 1998, E019739) [nonpub. opn.] (*Dawson I*)), and hereby take judicial notice of said opinion. We also take judicial notice of defendant's prior appeals (*People v. Dawson* (Sept. 9, 2014, E058728) [nonpub. opn.] (*Dawson II*) and *People v. Dawson* (Aug. 6, 2015, E062663) [nonpub. opn.] (*Dawson III*)). (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

appeared to have a gun in his hand. Rodriguez told the men to drop to the ground. One of the men complied, but the other two, including defendant, ran off. As Schultenrich walked in the direction he had seen the three men walking, he saw that two of them were now running back toward him. Schultenrich hid behind a pillar, and saw that defendant was running toward him while the other man ran in another direction. Schultenrich pulled his gun out and ordered defendant to get down on the ground. Defendant complied, and Schultenrich handcuffed him. When asked if he had any weapons on him, defendant told Schultenrich that he had a gun in his waistband. Schultenrich recovered a loaded .45-caliber handgun from defendant. The third man was apprehended by another officer. (*Dawson I, supra*, E019739.)

On February 9, 1995, an information was filed alleging defendant had committed an attempted robbery (§§ 664/211; count 1) and felon in possession of a firearm (former § 12021, subd. (a); count 4). The information also alleged that defendant had suffered two prior serious felony convictions (§ 667, subd. (a)) and two prior serious and/or violent felony strike convictions (§ 667, subds. (b)-(i)).

On May 24, 1995, a jury found defendant guilty as charged in counts 1 and 4. Defendant's prior serious felony and strike convictions were also found true.

On November 15, 1996, the trial court sentenced defendant to a total term of 35 years to life in state prison as follows: 25 years to life on count 1, a concurrent term of 25 years to life on count 4, and consecutive five-year terms for the two prior serious felony convictions pursuant to section 667, subdivision (a).

On April 26, 2013, the trial court denied defendant's petition for resentencing under section 1170.126, finding defendant ineligible for resentencing because his attempted robbery conviction was a serious felony.

On September 9, 2014, this court affirmed the denial of defendant's section 1170.126 petition in case number E058728. (*Dawson II, supra*, E058728.) We declined to address whether the trial court could resentence defendant on a felony that was neither serious nor violent, finding instead that defendant was ineligible for resentencing under section 1170.126 for his offense of being a felon in possession of a firearm because he was armed with a firearm at the time. The decision of this court in case No. E058728 indicates that defendant was in possession of a .45-caliber handgun when he was arrested following the attempted robbery.

On December 5, 2014, defendant filed a petition for recall of his indeterminate life term and for resentencing pursuant to section 1170.18. The trial court denied that petition, finding defendant did not satisfy the criteria in section 1170.18 and that defendant was not eligible for resentencing. (*Dawson III, supra*, E062663, p. 4.) On August 6, 2015, this court affirmed the trial court's order, finding that defendant was "currently serving' a sentence for offenses that are ineligible under Proposition 47." (*Id.* at p. 6.) We also noted in the opinion in case No. E062663 that the officer found a .45-caliber handgun in defendant's possession. (*Id.* at pp. 3-4.)

On April 9, 2018, defendant filed a petition for recall of his sentence pursuant to section 1170.126 with supporting exhibits. Defendant's petition alleged that he had

previously sought resentencing under section 1170.126, but that motion had been denied by the trial court because his attempted robbery was a serious felony. Defendant alleged that “[t]he Court of Appeal did not address whether resentencing could be denied on an all or nothing basis, because it agreed with the People that [defendant] was also ineligible for possessing the firearm because the record of his conviction shows he was armed with the firearm during the commission of that offense.” Defendant’s petition further alleged that this court relied on *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*) to reject his contention that exclusions from the operation of section 1170.126 must be proven beyond a reasonable doubt, and based on that, this court found he was armed in the commission of count 4. Defendant also argued that subsequent decisions from the California Supreme Court established that he was correct both in his assertion that section 1170.126 must be applied as to individual counts and in his assertion that exclusions from the operation of section 1170.126 must be proved beyond a reasonable doubt.

On August 23, 2018, the People filed an opposition to defendant’s petition, arguing there is no pleading and proof requirement for defendants already serving their sentence and seeking resentencing, citing *People v. Frierson* (2017) 4 Cal.5th 225, 237-238 (*Frierson*). The People conceded that this court did not apply the correct burden of proof in denying defendant’s second appeal, case No. E058728 (*Dawson II*), but argued that “the record shows [defendant] remains ineligible” both by the facts found in the prior appeals and by *People v. Hicks* (2014) 231 Cal.App.4th 275. The People also asserted

that *Osuna*, disapproved on another ground in *Frierson*, at page 240, footnote 8,³ held that reviewing courts properly may consider appellate opinions to determine whether a defendant was armed with a firearm in the commission of an offense.

A hearing on defendant’s petition was held on November 30, 2018. During the hearing, defendant’s trial counsel argued that being in possession of a firearm is not the same as being armed with a firearm and denied that defendant had been armed during the commission of the attempted robbery. Defendant’s counsel also claimed the fact that defendant was armed was not pleaded and proved beyond a reasonable doubt and noted that the jury convicted defendant of being a felon in possession but did not find that he was armed. Defense counsel further asserted that, “*Frierson* essentially imposes upon the Court to really conduct a retrial of the issue of the possession—felon in possession of a firearm, as well as the armed, in terms of—since the requirement is proof beyond a reasonable doubt as to that issue, whether or not he was in possession of firearm.”

The prosecutor responded that the trial court serves as the fact finder in cases in which a defendant seeks retrospective application of section 1170.126. The prosecutor argued the appellate record contained testimony that defendant had a gun in his pants and that defendant admitted he had a gun to the officers. The prosecutor also noted the defense contested that fact at trial, but the jury rejected defendant’s defense. Also, the People’s only theory of possession of the loaded firearm at trial was that defendant had

³ The Supreme Court in *Frierson* concluded that the People must plead and prove the defendant is ineligible for resentencing under Proposition 36 beyond a reasonable doubt, disapproving the holding in *Osuna* that a preponderance of the evidence standard applies.

the gun in his pants. The prosecutor conceded that *Frierson* required the trial court to find beyond a reasonable doubt that defendant was armed.

Following oral argument, the trial court took the matter under submission and noted it would provide counsel and defendant with a written decision within 30 days.

The trial court rendered its written decision on December 19, 2018, and denied defendant's section 1170.126 petition. The court found beyond a reasonable doubt that defendant was ineligible for relief under section 1170.126, because (1) he participated in the attempted robbery; (2) he was personally armed with a loaded .45-caliber handgun in his waistband during the commission of the attempted robbery; and (3) "[t]he loaded firearm was possessed by a Defendant in a manner where it was immediately available to Defendant for offensive or defensive use to accomplish the robbery and/or escape."

On January 28, 2019, defendant timely filed a notice of appeal from the order denying his section 1170.126 petition.

III

DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him on appeal. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court to conduct an independent review of the record. We offered defendant an opportunity to file a personal supplemental brief, and he has not done so.

An appellate court conducts a review of the entire record to determine whether the record reveals any issues which, if resolved favorably to defendant, would result in reversal or modification of the judgment. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Feggans* (1967) 67 Cal.2d 444, 447-448; *Anders v. California, supra*, 386 U.S. at p. 744; see *People v. Johnson* (1981) 123 Cal.App.3d 106, 109-112.)

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

IV

DISPOSITION

The order denying defendant's section 1170.126 petition to recall his sentence is affirmed.

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CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

MENETREZ

J.